



# FEDERALLY SPEAKING



by Barry J. Lipson

Number 24

## HISTORIC SUPREME COURT UPDATE IN PITTSBURGH

**- MARCH 12, 2003**

**The Federal Courthouse** in Pittsburgh will host a comprehensive **U.S. Supreme Court** CLE Update for all practitioners, on March 12, 2003, 9am-4pm, featuring U.S. Supreme Court Clerk William Suter, U.S. Court of Appeals Judge D. Brooks Smith, U.S. Attorney Mary Beth Buchanan, ACLU Executive Director Witold (Vic) Walczak, Duquesne Law Professor and Program Chair Ken Gormley, Pitt Law Professor John Parry, Columnist Barry J. Lipson, and Supreme Court practitioners Harry Litman and Thomas McGough. This major jurisprudential event is presented by the Federal Bar Association, Western Pennsylvania Chapter, in conjunction with Duquesne Law School. General Suter will conduct the historically significant first-ever Pittsburgh-based U.S. Supreme Court Swearing-In Ceremony. The five-hour CLE seminar, including one-hour ethics, will provide to new and experienced practitioners their annual update of significant Constitutional decisions, criminal, civil and civil rights; examination of the Court's 2003 docket; nuts and bolts of Supreme Court practice; and insights into the effects and aftermaths of 9/11 and into changes in the composition of the Court. Ethical consideration explored will include the Court's positions on criticisms of Judges and Judicial Proceedings; on unpublished opinions, their use and biases; and on ethnic and racial criteria. The relationships between the Pennsylvania and U.S. Supreme Courts will be reviewed. Cost: \$140.00 (\$125.00 for FBA members and Duquesne Law Alumni). Catered luncheon included. Immediate reservations recommended, as space is limited to size of Ceremonial Federal Courtroom. Send reservations and payment to Susan Santiago, Springer Bush & Perry, Fifteenth Floor, Two Gateway Center, Pittsburgh, PA 15222 (412/281-4900).

## **LIBERTY'S CORNER**

**FISA APPEALS COURT TORPEDOES WALL!** Curt Anderson of Associated Press reported that in *In Re: Sealed Case No. 02-001* (FISCR 2002), "a trio of ... semi-retired judge[s] on the **U.S. Court of Appeals** ... appointed by President Reagan" and "named by Chief Justice William Rehnquist" to the '**U.S. Foreign Intelligence Surveillance Court of Review**,' overturned the unanimous decision of seven (7) other Federal Judges (later joined by an eighth) forbidding "law enforcement officials" from "directing or controlling ... the use of the **FISA** procedures to enhance [non-espionage] criminal prosecution" (see October 2002 *Federally Speaking*). Thus, the **FISA** wall (50 U.S.C. 1801, et seq), erected to curb alleged **Federal Agencies'** abuses of the rights of American citizens, seems to have been torpedoed. Even though these apparently "hand picked" judges acknowledged that the **U.S. Supreme Court** in *City of Indianapolis*

*v. Edmond*, 531 U.S. 32 (2000) “cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable,” they allegedly so ruled because they had “learned” that “effective counterintelligence ... requires the wholehearted cooperation of all the government’s personnel who can be brought to the task,” and that a “standard which punishes such cooperation could well be thought dangerous to national security.” They also promulgated the novel “come close” rule that as “the procedures and government showings required under **FISA** ... come close” to meeting “the minimum **Fourth Amendment** warrant standards ... **FISA** as amended is **constitutional** because the surveillances it authorizes are reasonable.” Thus, if we “come close” to obeying the law we’re okay, right? According to Anderson, while the “government has sole right of appeal ... attorneys were exploring other ways of getting the case to the High Court.”

**Feet cut out from under standing.** A three judge panel of the **Ninth Circuit**, in a case involving the non-citizen Guantanamo Bay 9/11 detainees (*Coalition Of Clergy, Lawyers and Professors v. Bush*, No. 02-55367, DC CV-02-00570-AHM (9<sup>th</sup> Cir. 2002)), while cutting the feet out from under **standing**, showed an understanding of the **constitutional** status of **habeas corpus**. The court, accordingly, vacated “the district court’s determination that there was no jurisdiction in the **Central District of California** and its far-reaching ruling that there is no **United States court** that may entertain any of the **habeas** claims of any of the detainees. The **district court** was without jurisdiction to hold that the **constitutionally** embedded right of **habeas corpus** was suspended for all Guantanamo Bay detainees, without regard for their particular circumstances, whether they petitioned individually or through a true **next friend** on their behalf.” The Court affirmed, however, that because “the Coalition failed to demonstrate any relationship with any of the detainees, it lacks **next-friend** or **third-party standing** to bring a **habeas** petition on their behalf.” Subsequently, U.S. District Judge Mukasey, in *Padilla v. Bush*, No. 02 Civ. 4445 (SDNY 2002), held that “dirty bomb” suspect Padilla’s attorney, who had a prior dealing with this U.S citizen being held incommunicado after being arrested in the U.S., “may pursue this petition as **next friend** to Padilla” and “may consult” with Padilla. Some may think the **Ninth Circuit** here gavith with one foot and kickith with the other ....

## **Fed-pourri™**

**BACK ISSUES.** This column often carries stories continuous in nature, and may “bring issues back” or even “back into issues.” To aid in getting the “whole story,” the **U.S. District Court for the Western District of Pennsylvania** has graciously made all back issues of *Federally Speaking* available on their web site at <http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>.

**CORPORATE COUNSELS HEADS UP!** From years of corporate counseling it has been a “rule of thumb” that if you want the **Government** to bring a case they won’t, and if you don’t want the case brought they will! During my **Food, Dug and Cosmetic** days, I vividly remember amassing a case full of vivid “passing off” examples, by a major interstate supermarket chain, of private label groceries with label designs and coloring virtually identical to the brand name products (including those of my client), and shipping this case with a detailed analysis to the **FTC**. The **FTC**, of course, kept the case of groceries, while rejecting the legal case. But times may be a changing! In *U.S. v. ElcomSoft and Dmitry Sklyarov* (NDCA, CR-01-20138RMW), discussed in “*Digital Wars And Fair Use*,” December 2002 *Federally Speaking*, as stated therein, “Adobe, the producer of the subject ‘e-books’ ... handed the **FBI** the case on a ‘cyber-platter’.” According to the affidavit in this **Federal Criminal Prosecution** of **FBI** Special Agent Daniel J. O’Connell, assigned to the **FBI’s High Tech Squad** at San Jose, California, “Adobe purchased a copy of the ElcomSoft unlocking software over the Internet ... Thereafter, ElcomSoft ... electronically sent the unlocking key registration code from ElcomSoft [in Russia] to the purchaser (Adobe) in San Jose, California ... A review [by Adobe] of the opening screen on the ElcomSoft software purchased showed that a person named Dmitry Sklyarov is identified as being the copyright holder” of this AEBPR unlocking software. “Adobe learned that Dmitry Sklyarov is slated to speak on July 15, 1001 [sic: 2001] at a conference entitled Defcon-9 at Las Vegas Nevada” and advised me that “Sklyarov is scheduled to make a

presentation related to the AEBPR software program” there. The **Government** arrested and indicted Sklyarov when he visited the U.S. for this conference. From Adobe’s viewpoint, a great result. Adobe was able to drop its civil lawsuit and let the **Government** proceed criminally in its stead. (For another viewpoint, see **Digital Wars, supra.**) Thus, the bottom line of this “Heads Up” for plaintiff counseling is “it may be worth a shot to seek **Fed** involvement, if available it could be cheaper, harsher and more effective.” However, the “Heads Up” bottom line for defense counseling is more ominous: “**Fed** bullets may be a flying, keep you bottoms low and heads down!”

**COPYRIGHT UNLIMITED.** The **U.S. Supreme Court** this term will be deciding if “the author’s life plus 70 years” is the “limited” **copyright** contemplated by the **U.S. Constitution**. Thus, even under this contested term the **Constitution** has outlived its copyright, though not its usefulness. But what of the **Bible’s copyright** – unlimited?

## **FOLLOW-UP**

**CERTIFICATE OF APPRECIATION.** In addition to our “Accolades To Judge Lee” (regular November 2002 *Federally Speaking*), we give a ‘Certificate of Appreciation’ to District Judge Robert J. Cindrich of the U.S. District Court for the Western District of Pennsylvania, for his presenting of “Certificates of Appreciation” to those completing jury duty “in recognition of her good citizenship and the personal sacrifice made by her to serve her country as a juror,” and reminding them that: “Too many people take for granted the great blessings our democracy has bestowed upon us and our children. It is clear to me that you are aware that a democracy is not self-effectuating and that it demands the ongoing, active participation of the citizenry if it is to endure.”

**UNDERCOVER OF CREPPY OR CASE-BY-CASE?** While the **Third Circuit** two-judge majority in *North Jersey Media Group v. Ashcroft* (3<sup>rd</sup> Cir 2002; No. 02-2524), in reversing the lower court’s ruling that a blanket directive for closed “undercover” deportation hearings was **unconstitutional**, cautioned that they “are keenly aware of the dangers presented by deference to the executive branch when **constitutional liberties** are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy.” But, they apparently found that “openness” does not “plays a positive role” in immigration proceedings because they believed “the Government presented substantial evidence that open deportation hearings would threaten national security.” They also apparently found some solace in their belief that even without an open hearing “these aliens are given a heavy measure of **due process** -- the right to appeal the decision of the Immigration Judge (following the closed hearing) to the **Board of Immigration Appeals (BIA)** and the right to petition for review of the **BIA** decision to the **Regional Court of Appeals**. See also *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (noting that because the Constitution ‘provides the **Writ of Habeas Corpus** shall not be suspended, . . . some judicial intervention in deportation cases is unquestionably required by the **Constitution**’).” However, Judge Scirica strongly dissented, believing that for “these” people, and for “all of the people,” “the requirements of the test [in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)] are met. . . . Deportation hearings have a consistent history of openness” and the ‘**Supreme Court** . . . in both *South Carolina Port Authority [FMC v. South Carolina State Ports Authority*, 122 S. Ct. 1864 (2002)] and *Butz [Butz v. Economou*, 438 U.S. 478, 513 (1978)] concluded that **constitutional** principles applicable to civil cases were relevant to the administrative proceedings at issue. . . . Accordingly, the demands of national security under the logic prong of **Richmond Newspapers** do not provide sufficient justification for rejecting a qualified right of access to deportation hearings in general. . . . There must be ‘a **substantial probability**’ that openness will interfere with these interests . . . [and] deference is not a basis for abdicating our responsibilities under the **First Amendment**. . . . *United States v. Robel*, 389 U.S. 258, 264 (1967) (‘Implicit in the term national defense is the notion of defending those values and ideals which set this Nation apart.’). . . . But a case-by-case approach would permit an Immigration Judge to independently assess the balance of these fundamental values. Because this is a reasonable alternative, the **Creppy Directive’s** blanket closure rule is **constitutionally infirm**. As the **Supreme Court** reasoned in *Globe Newspaper* . . . ‘a mandatory rule requiring no particularized

determinations in individual cases, is **unconstitutional.**” (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)). For the Creppy judicial scorecard see “*Creppy’s ‘Stay’ at the Supreme Court,*” in the *Federally Speaking* Extra Issue of November 29, 2002.

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*The Western Pennsylvania Chapter of the Federal Bar Association, in cooperation with the Allegheny County Bar Association, brings you the editorial column Federally Speaking. The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, ACBA or author. You may contact Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail [blipson@wgbglaw.com](mailto:blipson@wgbglaw.com)).*

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